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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

JUN 28 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of ) MM DOCKET NO. 97-128  
)  
MARTIN W. HOFFMAN, )  
Trustee-in-Bankruptcy for Astroline ) File No. BRCT-881201LG  
Communications Company Limited )  
Partnership )  
)  
For Renewal of License of )  
Station WHCT-TV, Hartford, Connecticut )  
)  
SHURBERG BROADCASTING OF HARTFORD ) File No. BPCT-831202KF  
)  
For Construction Permit for a New )  
Television Station to Operate on )  
Channel 18, Hartford, Connecticut )

TO: Magalie Roman Salas, Secretary  
for direction to  
The Commission

REQUEST FOR ORAL ARGUMENT

1. Pursuant to Section 1.277(c) of the Commission's Rules, Alan Shurberg d/b/a Shurberg Broadcasting of Hartford ("SBH") hereby requests that the Commission schedule oral argument with respect to the Exceptions submitted in the above-captioned proceeding. SBH understands that, as a routine matter, the Commission has declined to hear oral argument in virtually any adjudicatory matter for a number of years. For the reasons set out below, however, SBH believes that this case presents issues of *such overriding CONSTITUTIONAL importance* that the Commissioners can and should take all possible steps -- including the holding of oral argument -- to assure that full and deliberate consideration is given to those issues.

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2. As set forth in the Exceptions submitted herein by SBH -- and as the Commission is doubtless already aware from the extensive history of this case, *see, e.g., Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902 (D.C. Cir. 1989), *rev'd sub nom. Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), *overruled, Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) -- questions of extraordinary Constitutional importance underlie this proceeding. The Commission's minority ownership policies (and particularly the minority distress sale policy) are race-based policies which by their very nature run counter to the Equal Protection Clause of the Constitution.<sup>1/</sup> While the Supreme Court sustained those policies in *Metro* (after they had been held unconstitutional in *Shurberg*), in order to do so the Supreme Court was forced to invoke a novel standard of judicial review which the Court itself later expressly disowned in *Adarand*.<sup>2/</sup> Unquestionably, the Commission's minority ownership policies raise serious Constitutional questions.

3. If the Commission intends to engage in race-based decision-making in the future -- and as recently as June 17, 1999 Chairman Kennard himself strongly advocated that

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<sup>1/</sup> As most eloquently expressed by the Appellants in *Brown v. Board of Education*, 347 U.S. 483 (1954),

[governmental classifications] based upon race and color alone . . . [are] patently the epitome of that arbitrariness and capriciousness constitutionally impermissible under our system of government. A racial criterion is a constitutional irrelevance, and is not saved from condemnation even though dictated by a sincere desire to avoid the possibility of violence or racial friction.

Appellants' Brief in *Brown*, filed September 23, 1952 at 6-7 (citations omitted).

<sup>2/</sup> In *Adarand*, the Court expressly overruled *Metro*, holding instead that the appropriate standard of review for such race-based governmental policies would be "strict scrutiny." But that was the standard applied by the Court of Appeals in *Shurberg* when that Court concluded that, under strict scrutiny, the minority distress sale policy was unconstitutional.

the Commission do so <sup>3/</sup> -- any such actions must be subject to extremely rigorous standards in order to pass Constitutional muster. *E.g.*, *Adarand*. The instant proceeding requires that the Commission address such standards.

4. The particular focus of the instant proceeding is the definitional standard(s) which must be met before an entity can be deemed a "minority-owned/controlled" entity entitled to some benefits as a result of that status. <sup>4/</sup> During the approximate period 1982-1985 and thereafter, the Commission developed a number of such standards. *See, e.g.*, *Corporate Ownership Reporting and Disclosure by Broadcast Licensees*, 97 FCC2d 997, 55 RR2d 1465 (1984), *on reconsideration*, 58 RR2d 604 (1985); *Citizenship Requirements of Section 310*, 58 RR2d 531 (1985), *on reconsideration*, 1 FCC Rcd 12, 61 RR2d 298 (1986); *Family Media, Inc.*, 102 FCC2d 752, 59 RR2d 165 (Rev. Bd. 1985); *Pacific Television, Inc.*, 62 RR2d 653 (Rev. Bd. 1987); *Religious Broadcasting Network*, 3 FCC Rcd 4085 (Rev. Bd. 1988); *Praise Broadcasting Network*, 8 FCC Rcd 5457 (Rev. Bd. 1993); *Saltaire Communications, Inc.*, 8 FCC Rcd 6284 (1993); *Gloria Bell Byrd*, 7 FCC Rcd 7976 (Rev. Bd. 1992), *aff'd*, 8 FCC Rcd 7126 (1993); *Atlantic City Community Broadcasting, Inc.*, 8 FCC Rcd 4520 (1993). The Commission assured the Court of Appeals and the Supreme Court that the Commission carefully scrutinized self-identified "minority" applicants to be sure that they satisfied such standards. *E.g.*, FCC Brief in *Astroline Communications*

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<sup>3/</sup> See Remarks of William E. Kennard, Chairman (Citizenship Education Fund, June 17, 1999).

<sup>4/</sup> Of course, this assumes that a business entity -- corporation, partnership, limited liability company, etc. -- can *ever* legitimately be deemed to possess some racial or ethnic characteristic or identity warranting favorable governmental treatment. Race and ethnicity are, after all, fundamentally *immutable personal* factors. By contrast, business entities are impersonal governmentally-created structures whose ownership and control is subject to near-infinite change and/or manipulation, as demonstrated by the record of the instant case. SBH specifically challenges the Commission to explain how or why racial or ethnic attributes can or should ever be ascribed to such entities.

*Company Limited Partnership v. Shurberg Broadcasting of Hartford, Inc.*, No. 89-700 (U.S.S.C., filed February, 1990) ("*ACCLP v. SBH*") at 43.

5. Astroline Communications Company Limited Partnership ("*ACCLP*") claimed, from 1984 through 1990, to be entitled to specialized, preferential treatment because of its claimed status as a minority-owned/controlled limited partnership. The Commission advised the Courts that the Commission had scrutinized *ACCLP* carefully and had found it to be a qualified "minority" entity. *E.g., id.*

6. But the record as developed in the hearing in the instant proceeding establishes conclusively that *ACCLP* did not come close to meeting the Commission's announced standards. *See SBH Exceptions at, e.g., 10-16.* And the record demonstrates that *ACCLP* knowingly declined to provide the Commission with information which *ACCLP* knew was required to be filed but which undermined *ACCLP*'s claims of compliance with the Commission's "minority" standards. *See SBH Exceptions at, e.g., 16-22.*

7. The ALJ (in the Initial Decision) and the Mass Media Bureau ("Bureau") (in its Reply to *SBH*'s Exceptions), both assert that the standards announced by the Commission beginning in 1985 relative to determining ownership and control of limited partnerships could and should be ignored, even though *ACCLP*'s application to acquire Station *WHCT-TV* was pending continually from July, 1984 through September, 1990. *E.g., Bureau Reply to SBH Exceptions at 6-7.* The ALJ and the Bureau also assert that at least some of those stringent standards should not be deemed relevant to applicants seeking racial or ethnic preferences. *E.g., Bureau Reply to SBH Exceptions at 4.*

8. If those assertions are affirmed by the Commission, the Commission will be declaring that the standards it imposes on applicants seeking racial preferences (if such

standards exist at all) are significantly looser than the standards imposed on other applicants. Such an approach cannot be squared with *Adarand*, which requires that very narrowly tailored standards be developed and applied when the government seeks to grant preferences based on race or ethnicity. More importantly, such an approach cannot be squared with the Constitution.


9. Nor can the Commission properly ignore the fact that ACCLP affirmatively chose *not* to file with the Commission information which undermined ACCLP's continuing claim that it was a minority-owned/controlled entity. The record clearly demonstrates that ACCLP was aware that it was required to file that information, and that ACCLP was able to file that information. And yet, ACCLP chose not to file that information because of certain "implications". See SBH Exhs. 88, 89; SBH Exceptions at 18-19. As a result, when the Commission advised the United States Supreme Court, in 1990, that the Commission would review partnership agreements of supposedly "minority" partnerships "to ensure that complete managerial control over the station's operations is reposed in the minority general partner(s)", FCC Brief in *ACCLP v. SBH* at 43, n. 41, the Commission's claim was certainly overstated relative to ACCLP because ACCLP had not provided the Commission with current (or even relatively current) information which would have permitted such review.<sup>5/</sup>

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<sup>5/</sup> The ALJ and the Bureau seem to try to dodge this consideration by claiming that ACCLP's assignment application was filed and initially granted in 1984, so no changes subsequent to that time - either changes in ACCLP's structure or changes in governing Commission standards -- are relevant. But that claim ignores the fact that, while it may have been initially granted in 1984, ACCLP's assignment application remained pending and non-final through September, 1990 as a result of the pendency of SBH's appeal of that action. Section 1.65(a) of the Commission's Rules. As a result, ACCLP was clearly required to notify the Commission of changes in ACCLP's structure. *Id.* And as SBH has argued in its Exceptions, precedent concerning the regulatory treatment of limited partnerships subsequent to 1984 was clearly intended by the Commission to apply to then-pending applications.

10. The Commission's ability to engage, Constitutionally, in race-based decision-making is integrally tied to the ultimate resolution of this case. ACCLP's assignment application was originally granted solely because ACCLP was supposedly a "minority" entity, and the Commission consistently defended the grant on that basis. Continued adherence to that notion -- a notion whose invalidity is plainly established in the evidentiary record of this case -- would demonstrate that the Commission has been and continues to be deaf to the instruction of *Adarand* and its progeny. In view of the Constitutional questions at issue here, SBH submits that the Commission can and should devote maximum attention to this case -- including holding an oral argument to permit full discussion concerning all factual and legal issues.

Respectfully submitted,

  
/s/ Harry F. Cole  
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June 28, 1999

CERTIFICATE OF SERVICE

I hereby certify that, on this 28th day of June, 1999, I caused copies of the foregoing "Request for Oral Argument" to be placed in the U.S. Postal Service, first class postage prepaid, or hand delivered (as indicated below), addressed to the following:

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